Office - Supreme Court, U.S.
FILED
MAR 21 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1093

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TROY L. WELCH and JAY F. WELCH,
Appellants,

vs.

CLAIBORNE COUNTY BEER BOARD, *et al.*,
Appellees.

On Appeal From The Supreme Court Of Tennessee

MOTION TO DISMISS OR AFFIRM

W. J. MICHAEL CODY
Attorney General & Reporter
for the State of Tennessee
Counsel of Record

KATE EYLER
Deputy Attorney General

DANIEL B. BROWN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3491

Attorneys for Appellee
W. J. Michael Cody
Attorney General & Reporter
for the State of Tennessee

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

BEST AVAILABLE COPY

19pp

QUESTIONS PRESENTED

1. Whether Tennessee Code Annotated § 57-5-105(f), which authorizes certain Tennessee counties to establish a location requirement for the sale of beer, delegates any legislative power to affected nonconsenting residential owners in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether an application for a permit to sell beer affords the potential applicant any constitutionally protected liberty or property rights.

3. Whether Tennessee Code Annotated § 57-5-105(f), which is silent as to any church or religious entity, has the effect of advancing religion, favoring one religion over another or results in an excessive entanglement of church and state in violation of the Establishment Clause of the First Amendment.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Statement	2
Argument	4
1. Section 57-5-105(f) Does Not Delegate Legislative Authority To Private Individuals In Derogation Of Constitutional Guarantees	4
2. Applicants For A Permit To Sell Beer Do Not Have Protected Liberty Or Property Interests	8
3. Section 57-5-105(f) Does Not Violate The Establishment Clause	10
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972)	8,9
California v. LaRue, 409 U.S. 109, 114 (1972)	4,5
Cantrell v. DeKalb County Beer Board, 213 Tenn. 568, 572-73, 376 S.W.2d 480 (1964)	9
Coffman v. Washington County Beer Board, 615 S.W. 2d 675, 677 (Tenn. 1981)	5
Davis v. Blount County Beer Board, 621 S.W.2d 149 (Tenn. 1981)	5,6
Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, n. 12 (1976)	7

Eubank v. City of Richmond, 226 U.S. 137 (1912) 7

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)..... 5

Hostetter v. Idelwild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 5

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)..... 11

McClellan v. State of Tennessee, 199 Tenn. 60, 64, 282 S.W.2d 631 (1958)..... 7

Mugler v. Kansas, 123 U.S. 623 (1887) 6,8

Needham v. Beer Board of Blount County, 647 S.W.2d 226, 230-31 (Tenn. 1983) 7,9

New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 114 (1978) (Blackmun, Powell, J.J., concurring) 7,8,10

Oklahoma Alcoholic Beverage Control Board v. Seely, 621 P.2d 534, 537 (Okla. 1980) 8

Patch Enterprises, Inc. v. McCall, 447 F.Supp. 1075, 1081 (M.D. Fla. 1978)..... 8

Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917) 6,7

Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928)..... 7

Williamson v. Lee Optical Co., 348 U.S. 483 (1958) 5

Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) .. 5

Wolman v. Walter, 433 U.S. 229, 236 (1977) 11

Zorach v. Clauson, 343 U.S. 306 (1952) 10

Constitution and Statutes:

United States Constitution

First Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

Twenty-First Amendment 4,5,7

28 U.S.C. § 1257(2) 2

Tenn. Code Ann. § 57-5-105 (Supp. 1984) 5,9

Tenn. Code Ann. § 57-5-105(f) (Supp. 1984) ..... *passim*

No. 84-1093

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TROY L. WELCH and JAY F. WELCH,
Appellants,

vs.

CLAIBORNE COUNTY BEER BOARD, *et al.*,
Appellees.

On Appeal From The Supreme Court Of Tennessee

MOTION TO DISMISS OR AFFIRM

The appellee, W. J. Michael Cody, Attorney General and Reporter for the State of Tennessee, moves this Court pursuant to Rule 16 of the United States Supreme Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Tennessee on the ground that the questions presented here are so unsubstantial as not to warrant further argument.

OPINION BELOW

The October 29, 1984, opinion of the Supreme Court of Tennessee is attached to the appellants' Jurisdictional Statement as Appendix A.

JURISDICTION

Appellants seek to invoke this Court's jurisdiction under 28 U.S.C. § 1257(2).

STATEMENT

Appellants seek a direct appeal from the final judgment and decree of the Tennessee Supreme Court entered October 9, 1984. That ruling upheld the validity of Tennessee Code Annotated § 57-5-105(f) (Supp. 1984) against the appellants' Due Process and Establishment Clause challenges under the United States Constitution.

In July, 1982, appellants applied to the Claiborne County Beer Board for a license to sell beer. Previously, the Board had adopted a resolution pursuant to Tennessee Code Annotated 57-5-105(f) forbidding the sale of beer within 300 feet of a residential dwelling, provided that the residential homeowner appear in person before the County Beer Board and object to the issuance of the permit. At the hearing on the application before the County Beer Board, Mr. Fred Chumley, an owner of a residence within 300 feet of the proposed site for beer sales, appeared and objected to the issuance of the permit. The Chancellor at trial stated that Mr. Chumley's opposition was based on his personal religious beliefs, but that the giving of religious reasons is superflous to the purpose of the statute. The County Beer Board denied the permit.

Appellants filed a petition for a writ of certiorari in the Claiborne County Chancery Court for the purposes of seeking a review of the Beer Board action and questioning the constitutionality of Tennessee Code Annotated § 57-5-105(F) (Supp. 1984). William M. Leech, Jr., then Attorney General and Reporter for the State of Tennessee, intervened in this cause for the sole and limited purpose of defending the constitutionality of the challenged statute. W. J. Michael Cody now serves as the

Tennessee Attorney General and Reporter and has served since July, 1984.

On April 7, 1983, the case came to trial before the Claiborne County Chancery Court which, in a *de novo* hearing, found in favor of the defendants Beer Board and its members and upheld the constitutionality of the challenged statute. On appeal, the Tennessee Supreme Court affirmed.

The Tennessee Supreme Court basically held that (1) the statute does not violate the Due Process Clause because appellants did not meet all the requirements necessary for the issuance of a permit to sell beer, (2) the location prohibition prescribed by the County's resolution adopted pursuant to the state statute is absolute unless waived by an affected residential dweller, (3) a permit to sell beer is a temporary permit and not a right of property, and (4) the challenged statute does not confer a "veto power" upon churches and that First Amendment principles are not involved in this case. The Tennessee Attorney General submits that these issues, having received the full and careful consideration by the Court below, do not raise any doubt as to their disposition before this Court and raise questions so unsubstantial as not to warrant further review.

ARGUMENT

Quite apart from the correctness of the decision below, the appellants raise no issue of general importance warranting this Court's review. Throughout their argument, appellants understate the subject matter involved in this case: licensing the sale of intoxicating beverages. In so doing on the first issue—delegation of legislative power—appellants ignore the absolute legislative prohibition of beer sales at certain locations unless the prohibition is waived by the affected residential landowner. On the second issue, appellants seek an examination of procedural due process in a profession which, in Tennessee, is neither granted nor guaranteed a protected liberty or property interest. Finally, a plain reading of Tennessee Code Annotated Section 57-5-105(f) indicates that an Establishment Clause analysis has no point of origination relative to the challenged statute. Because Section 57-5-105(f) is a reasonable means of regulation in an area where states have wide latitude to regulate, *see generally, California v. LaRue,* 409 U.S. 109 (1972), the legal issues here are unimportant and warrant no further review.

1. Section 57-5-105(f) Does Not Delegate Legislative Authority To Private Individuals In Derogation Of Constitutional Guarantees

Appellants contend that Section 57-5-105(f) authorizes the delegation of legislative authority to private individuals in violation of the Due Process Clause of the Fourteenth Amendment. Appellants assume that a legislative enactment which allows an affected residential landowner to waive a location requirement necessary for a permit to sell beer is constitutionally impermissible. As correctly held by the Court below, appellants' assumption cannot be supported in law on the facts of this case.

At the threshold, this case involves the licensing of applicants for the sale of intoxicating liquors and the police power granted to the states by the Twenty-First Amendment. Although a state's regulation of liquor under that amendment must be exer-

cised consistently with other constitutional provisions, *see Wisconsin v. Constantineau,* 400 U.S. 433, 436 (1971), each constitutional provision "must be considered in the light of the other and in the context of the issues and interests at stake." *Hostetter v. Idelwild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964).

The Twenty-First Amendment confers on the states exclusive control of the sale of alcoholic beverages, and, in so doing, "something more than the normal state authority over public health, welfare and morals." *California v. LaRue,* 409 U.S. 109, 114 (1972). Moreover, states may, through general ordinances, restrict the commercial use of property, *see Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), and the geographic location of commercial enterprises. *See Williamson v. Lee Optical Co.,* 348 U.S. 483 (1958). The Tennessee Supreme Court has further stated that the state has the power to restrict the location of establishments for the sale of intoxicating beverages and may require that they be located a particular distance from the property of others. *Davis v. Blount County Beer Board,* 621 S.W.2d 149, 152 (Tenn. 1981).

The legislative provision at issue here is part of a statutory scheme which establishes the minimum requirements for the issuance of a beer permit in certain areas. Tennessee Code Annotated § 57-5-105(Supp. 1984). Subsection 57-5-105(f) sets forth a specific location requirement which, if failed, renders the applicant disqualified. *See Coffman v. Washington County Beer Board,* 615 S.W.2d 675, 677 (Tenn. 1981). The applicant fails to meet the location requirement, in this instance, if a residential landowner within 300 feet of the proposed site appears at the hearing on the application and protests the issuance of the permit.

Therefore, appellants incorrectly contend that an applicant is qualified but for the homeowner's objection. Appearance and protest of the homeowner merely signify to the Beer Board that

an applicant has not met all the requirements necessary for the grant of a permit. Thus, the objection of the homeowner does not restrain appellants from any rights that they may have previously enjoyed or which they may have expected. The next step—denial of the permit's issuance—is a legislative rather than an individual act. The Tennessee Supreme Court has correctly characterized the operation of the statute accordingly: "The effect of a protest is to deny the permit, but that effect is derived from the legislative enactment and the ordinance passed thereto, not from the residence owner." *Davis,* 621 S.W.2d at 152.

It follows that private individuals have no legislative or policy making authority under Section 57-5-105(f). The homeowner's objection merely effectuates the legislative determination that when an owner of a pre-existing residence objects to the sale of beer within 300 feet of his residence, the public interest warrants the prohibition of the issuance of a permit to sell beer. Because the sale of intoxicating liquor has traditionally been viewed as an offensive land use with the potential to interfere with other land uses, *see Mugler v. Kansas,* 123 U.S. 623 (1887); *Thomas Cusack Co. v. City of Chicago,* 242 U.S. 526, 530 (1917), it cannot be said that Section 57-5-105(f) operates arbitrarily or upon an individual's "standardless" whim as appellants contend. In this regard, the statute operates like the ordinance in *Cusack,* the leading case on point.

In *Cusack,* this Court examined and rejected a challenge that a Chicago ordinance conditioning proposed billboard sites on the consent of nearby residential landowners delegated legislative authority to private individuals. In so doing, the Court stated that (1) regulation and control over the construction of billboards was a legitimate exercise of the city's police power, *Cusack,* 242 U.S. at 529-530; and (2) that the consent provision modified an otherwise absolute ban on billboard construction. *Id.* at 531.

These two features are clearly present in the statute in question. As already discussed, the state has broad authority to regulate the sale of alcoholic beverages under the Twenty-First Amendment. Pursuant to this power, the Tennessee Supreme Court has consistently taken the position that the sale of intoxicating liquors is an absolute prohibition relaxed only through the issuance of a permit: "A license to sell liquor [or beer] is not a contract by right of property but is merely a temporary permit to do that which would otherwise be unlawful." *Needham v. Beer Board of Blount County,* 647 S.W.2d 226, 230 (Tenn. 1983); *quoting McClellan v. State of Tennessee,* 199 Tenn. 60, 64, 282 S.W.2d 631 (1958). As such, Section 57-5-105(f) is a clear expression of governmental policy that a license will not issue to locations within 300 feet of a residence in the face of a nonconsenting affected residential landowner.

Appellant's reliance on this Court's holdings in *Eubank v. City of Richmond,* 226 U.S. 137 (1912) and *Washington ex rel Seattle Title Co. v. Roberge,* 278 U.S. 116 (1928) is misplaced. These cases can be distinguished on the equities inherent in their underlying facts. *Eubank* and *Roberge* involved ordinances which substituted private discretion for any official determination of the public interest relative to set-back lines (*Eubank*) and a philanthropic home (*Cusack*). Neither of these decisions indicate that such land uses were public welfare hazards necessitating the invocation of the governing entity's police power. *Eubank,* 226 U.S. at 143-44; *Roberge,* 278 U.S. at 122. The *Cusack* prohibition, however, was said to restrict a deleterious land use which the legislation could regulate to further "the interest of safety, morality, health and decency in the community." *Cusack,* 242 U.S. at 529-30. Because liquor outlets pose a similar threat to the public welfare, *see Id.* at 530, the Tennessee legislature may, under its police powers, likewise condition the imposition of a restriction upon the lack of consent of the parties that the regulation seeks to protect. *Cusack,* 242 U.S. at 531; *see also Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668, 677-78 n.12 (1976); *New Motor Vehicle*

Board v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978). Because of the nature of the interests at stake, the challenged legislation is an appropriate instance for a consent provision—a provision which effectuates a reasoned and reasonable legislative policy regarding the sale of alcoholic beverages.

2. Applicants For A Permit To Sell Beer Do Not Have Protected Liberty Or Interests

Appellants next argue that Section 57-5-105(f) deprives them of their liberty to pursue an occupation without due process of law. Appellants contend that absent the objecting resident, they are constitutionally entitled to engage in the business of selling beer.

The argument posed by Appellants assumes that the sale of beer is a common occupation of life when in fact such an occupation is subject to a high degree of supervision and regulation in the interest of the public welfare. *See Oklahoma Alcoholic Beverage Control Board v. Seely,* 621 P.2d 534, 537 (Okla. 1980). Because a state's police power has long included the ability to control and regulate the distribution of liquor within its borders, *see Mugler v. Kansas,* 123 U.S. 623 (1887), a license to sell beer cannot be compared equally to licenses required in common occupations or businesses. *See generally, Patch Enterprises, Inc. v. McCall,* 447 F.Supp. 1075, 1081 (M.D. Fla. 1978).

Appellants' claim of a protected property interest in the beer permit likewise ignores the nature of the interest at stake. Constitutional procedural due process is designed as a safeguard of the security of interests that an individual has already obtained in specific benefits; that is, it is designed for the protection of a "property interest." *Board of Regents v. Roth,* 408 U.S. 564, 576 (1972). The test for determining whether one has a property interest in a benefit is well established:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation. He must instead, have a legitimate claim of entitlement to it....Property interests of course....are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...

Roth, 408 U.S. at 577.

In order to obtain a license to sell beer, an applicant is required to establish by proof that his application complies with the conditions and provisions set out in Tennessee Code Annotated § 57-5-105. *Cantrell v. DeKalb County Beer Board,* 213 Tenn. 568, 572-73, 376 S.W.2d 480 (1964). Under state law then, the applicant has no more than a unilateral expectation that he will receive his license unless and until he provides sufficient proof that he has complied with all of the requirements of Section 57-5-105. As applicants for the beer permit, then, appellants cannot contend that they had a "legitimate claim of entitlement" to the permit.

Even assuming that the appellants did meet the 300-foot rule location requirement, the law in Tennessee maintains that "there is no property right in a permit to sell beer." *Needham v. Beer Board of Blount County,* 647 S.W.2d 226, 231 (Tenn. 1983). Because a license to sell liquor "is not a contract by right of property but is merely a temporary permit to do that which would otherwise be unlawful," *Id.* at 231, even a licensed operator can be deprived of his license under certain circumstances. *Needham,* 647 S.W.2d at 230.

Because of the character of the interests at stake here, appellants cannot complain that the hearing afforded them by the Beer Board upon denial of the application and the *de novo* hearing in the Trial Court fail to meet the requirements of constitutional due process. Having demonstrated the absence of a protected liberty or property right, appellants have no claim to ad-

ditional procedural safeguards. *See New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 114, (1978) (Blackmun, Powell, J.J., concurring).

3. Section 57-5-105(f) Does Not Violate The Establishment Clause

Appellants' contention that Section 57-5-105(f) violates the Establishment Clause strains any reasonable First Amendment analysis. The Court below "carefully considered" appellants' church and state argument and properly dismissed the contention because "First Amendment principles are not involved here." (*See* Appellants' App. A at A-3.)

Appellants construct their Establishment Clause challenge on the evidentiary inference that the objecting landowner based his objections on religious grounds. The reason for objection has no importance in a discussion of Section 57-5-105(f). Operation of the authorized objection is religion-neutral: an objection for no reason or for a multitude of reasons affects the homeowner protections provided by the legislature. Clearly, the purpose of the statute is secular. Any benefit realized by a church would be too remote or incidental to convert a permissible statute into one violative of the Establishment Clause. *See Zorach v. Clauson,* 343 U.S. 306 (1952)(the policeman who directs traffic on Sunday morning so that parishoners may cross the street to go to church does not represent a violation of the Establishment Clause).

Moreover, the statute does not, and cannot, vest in churches the power to prevent the issuance of a beer permit within a specified area. The operative objection belongs exclusively to the individual homeowner. To suggest that the statute is susceptible to religious ends is to conclude, as appellants must to sustain their argument, that churches can and do direct their parishoner's decisionmaking. Because the decision to object on whatever ground rests ultimately with the homeowner, the statute does not empower a church to advance its interest via

Section 57-5-105(f). For the same reason, the statute does not fuse governmental and religious functions. (*c.f. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982)(a statute substituting a church's power for the discretionary powers of government held violative of the Establishment Clause). For each of the reasons above, the Court below was correct in its assertion that church and state issues are not present here. Clearly, Section 57-5-105(f) fulfills the criteria stated in *Wolman v. Walter,* 433 U.S. 229, 236 (1977).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal be dismissed, or, in the alternative, the judgment entered by the Supreme Court of Tennessee be affirmed.

Respectfully submitted,

W. J. MICHAEL CODY
Attorney General & Reporter
For the State of Tennessee
Counsel of Record

KATE EYLER
Deputy Attorney General

DANIEL B. BROWN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3491

Attorneys for Appellee
W. J. Michael Cody,
Attorney General and Reporter
For the State of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion to Dismiss or Affirm has been mailed this 20th day of March, 1985, to the below-referenced counsel.

William G. Cockrill
McCORD, COCKRILL & WEAVER
2232 Plaza Tower
P. O. Box 2046
Knoxville, Tennessee 37901
Attorneys for Appellants

William R. Stanifer
STANIFER & STANIFER
P. O. Box 203
Tazewell, Tennessee 37879
Attorney for Claiborne County Beer Board;
Claiborne County, Tennessee

W. J. MICHAEL CODY
Attorney General & Reporter
STATE OF TENNESSEE